**U.S. Department of Labor**

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099
(757) 873-3634 (FAX)

**Issue date: 14Feb2002**

Case No.: **2000-LHC-0995**

OWCP No.: **14-129839**

In the matter of

**SHIRLEY A. DILTS (Widow of HENRY C. DILTS),**
Claimant,
v.
**TODD SHIPYARD CORPORATION,**
Employer,
and
**EAGLE PACIFIC INSURANCE COMPANY,**
and
**TRAVELERS CASUALTY AND SURETY CO. (Formerly AETNA CASUALTY AND SURETY COMPANY),**
and
**FREMONT COMPENSATION INSURANCE GROUP,**
Carriers,
and
**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,**
Party-In-Interest.

## DECISION AND ORDER GRANTING THE EMPLOYER/CARRIER'S MOTION FOR SUMMARY DECISION

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers, Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Seattle, Washington, on June 19, 2001 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. 29 C.F.R. §18.41 pertains to summary decision.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

## Preliminary Matters[1]

Testimony at the hearing indicated tht Mr. Dilts worked for Todd Shipyards from 1975 to 1994. Travelers Casualty and Surety Company, formerly known as Aetna Casualty and Surety Company was the insurance carrier from 1965 until August 16, 1990. Freemont Compensation Insurance Group provided coverage from August 17, 1990 through November 16, 1991. Eagle Pacific Insurance Company provided coverage beginning on November 17, 1991.

The hearing covered numerous issues including exposure to asbestos, asbestosis, and death due to such impairment. Other issues included a bar to benefits under Section 33(g) of the Act, and entitlement to Section 8(f) relief.

Mr. Dilts died on July 17, 1999.

**Employer's and Carrier's joint Motion for summary decision based on applicability of Section 33(g) of the Act**

On August 30, 2001, the defendants filed the above motion on the basis that Mrs. Dilts entered into fully executed third party settlements without the prior written approval of Todd Pacific Shipyards.

At the conclusion of a conference call in late October, 2001, each party was given additional time to develop evidence and to submit briefs.

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[1] *The following abbreviations will be used as citations to the record:*

| | | |
|---|---|---|
| *JS* | - | *Joint Stipulations;* |
| *TR* | - | *Transcript of the Hearing;* |
| *CX* | - | *Claimant's Exhibits;* |
| *TX* | - | *Traveler's Exhibits; and* |
| *FX* | - | *Freemont Exhibits.* |

Section 33(g) of the Act provides

> (1) If the person entitled to compensation (or the person*s representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person*s representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer*s carrier, before the settlement is executed, and by the person entitled to compensation (or the person*s representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer*s insurer has made payment or acknowledged entitlement to benefits under this Act.

Mrs. Dilts was represented by Larry O. Norris, Esq., of Mississippi in the asbestos litigation. The firm of Leggett & Kram in Washington State is counsel in the longshore case.

At the hearing, the following discourse occurred between counsel for Eagle Pacific and Mrs. Dilts.

> Q The third party claim that*s being handled by Andrew Phelps,[2] --
>
> A Uh—huh.
>
> Q -- have there been any settlements to date in that case?

---

[2] *Mr. Phelps is associated with Mr. Norris.*

A Yes. I got about two or three checks I think it was.

Q Have you negotiated those checks? Which is to say, deposited those checks –

A Yes.

Q -- into your bank account?

A Yes.

Q And do you recall the amount of those recoveries, as they call it?

A One was 21,000, the other ones were like 300 and something, $100, and little bitty ones, but the main one was the one for 21,000. [TR. 98].

Counsel for Travelers continued the discussion

Q The case that you received the checks on, this third party case that we*ve been calling it, it settled at some time in the past. How long ago did it settle?

A I -- well, let*s see. He died in July, and I think I started it in about September or October. I talked to them, and that was the same year, ‘99.

Q So you started the lawsuit after your husband passed away?

A Yes, I did my part of it, yes, the asbestos.[TR 110].

In August 2001, Mr. Norris reported

| **Defendant** | **Gross Settlement** | **Net Settlement Amt.** |
|---|---|---|
| Garlock | $ 2,500.00 | $ 1,405.00 |
| Zurn | $ 225.00 | $ 135.00 |
| Worthington | $ 75.00 | $ 45.00 |
| 3M | $ 400.00 | $ 240.00 |
| Owens Corning Fiberboard | $ 40,000.00 | $ 21,149.00 |
| Sepco | $ 56.00 | $ 33.60 |

* NOTE: This is a partial settlement only, and the claims will remain against the remaining defendants.

In reference to the above, in late July 2001 Mr. Leggett stated that

> I am advised by Mr. Norris that these settlements have not been consummated and are conditioned upon Mr. Dilts* employer*s approval. We have requested the appropriate forms from the Department of Labor to satisfy the requirements of 33 U.S.C. § 933(g)(1). By copy of this letter, I am requesting the employer and the employer*s carriers to approve the proffered settlements as set forth above and to sign the appropriate form when received.

Counsel also submitted copies of letters dated in mid-July 2001 which stated

> As per our agreement, please be advised that Garlock Inc. considers the above referenced matter settled, pending the employer*s approval.
>
> As per our agreement, please be advised that Dresser Industries, Inc. and Worthington Corporation consider the above-referenced matter settled, pending the employer's approval.
>
> This is to confirm that Minnesota Mining and Manufacturing Company has settled the above claim, pending the employer's approval.

In February 2001, a United States District Court in Mississippi issued an agreed judgment of dismissal with prejudice of claims of numerous plaintiffs (including Mrs. Dilts) against Sepco Corporation.

In August 2001, Mr. Leggett indicated that Owens Corning Fibreboard was in bankruptcy but would present a letter similar to those sent in July.

In September 2001, Mr. Norris stated that

> the bankruptcy situation with regard to Mrs. Dilts* claims was a take it or leave it situation. There was no choice provided. The Bankruptcy Courts create

> Trusts which determine what they are paying and they cannot be sued.
>
> Mr. Norris reported in November 2001
>
> That the asbestos claims of Henry Dilts which have been settled do not represent all the Defendants which will likely pay claims of Henry Dilts;
>
> That a new suit has been filed naming 116 additional defendants and payment is anticipated on settlements out of that group of defendants;
>
> That W. R. Grace and Owens Corning-Fibreboard in their settlement agreements entertained filing bankruptcy, and the amount they paid was more or less a take it or leave it situation, and after they paid, they did in fact go bankrupt;
>
> That as far as the other bankrupts go, the trusts are set up, and we do not have any control over how much or when they will pay;
>
> That we are negotiating in the fonolic resin fields and we anticipate filing new claims against new defendants in that area, and Henry Dilts would be likely to recover in that situation;
>
> That after all the new defendants pay and the bankrupts pay, Henry Dilts* total settlements are likely to be equal to or greater than that of his Longshoreman Harbor Workers* claim, but the litigation for these cases may take several more years.

Claimant's counsel submitted articles indicating that at least two asbestos companies (presumably Owens Corning, Babcock & Wilcox, and Armstrong) that compensated the Claimant are in bankruptcy. Counsel stated that

> No settlement has been reached which required the approval of the employer.
>
> Counsel reports that

In Estate of Cowat v. Nicklos Drilling Company, 505 U.S. 470, 112 S.Ct. 2589 (1992), the court stated that there were two circumstances in which it would be unnecessary for the claimant to obtain the agreement of the employer before concluding a third party action. First, if the amount of the settlement is equal to or greater than the employer*s liability. Second, if the suit results in a judgement. The court explained the second exception as follows:

> "In cases where, a judgement is entered, however, the employee does not determine the amount of his recovery, and employer approval, even if somehow feasible, would serve no purpose."

Claimant's Counsel argues that

> it is by no means clear that the Claimant was required to seek approval of the corporation, not only on the grounds that the amount she received was not the result of negotiated settlement, but also on the grounds that her current settlement figure may be in excess of the amount to which she is entitled under the Longshore and Harbor Workers Act. The Employer, as the moving party, is required to show by a preponderance of the evidence that the amount for which the Claimant has settled her claims is (less than) the amount she will recover under the Longshore & Harbor Workers' Act.

Here, the Employer has failed to introduce any evidence to substantiate that the gross amount of the Claimant*s settlement is less than she will ultimately recover under the Longshore & Harbor Workers Compensation Act.

Finally, it should also be noted that the third party case is still open and that several defendants have not yet settled. The Claimant*s ultimate settlement amount may be even higher than the approximately $60,000 figure which the Employer submitted with their motion to dismiss.

In the motion, the employer/carriers noted that Mr. Dilts died on July 14, 1999 and that on August 26, 1999, Mrs. Dilts obtained counsel to pursue asbestos litigation.

Employer's counsel noted Mrs. Dilts' release of Owens Corning in June, 2000 and the release of Garlock, Inc. in August of that year. Counsel reported that

> Much like the release entered into with Owens Corning, there is no provision requiring claimant to obtain the approval of Mr. Dilts* employer, nor that she would be required to pay back any settlement proceeds to Garlock should she be unable to secure Mr. Dilts* employer*s approval.
>
> Between October 2000 and June 2001, claimant continued to sign releases with various defendants in the Mississippi asbestos litigation. All releases contain virtually identical language as referenced above and none contain a condition precedent requirement claimant to obtain the written approval of Mr. Dilts* employer. The various releases claimant has signed release all her claims against the following companies: Combustion Engineering (Todd/Fremont 3.78-3.79, 3.84 – 3.88); Minnesota Mining and Manufacturing Company ("3M")(Todd/Fremont 3.43, 3.45, 3.80-3.83); Robertson Ceco Corporation, Georgia Pacific Corporation, Gasket Holdings, Flexitallic, Ingersoll-Rand, Industrial Holdings Corporation, BP Amoco, Unifrax Corporation, Standard Oil Company, Kennecott Corporation, Kennecott Mining Corporation, and Stemcor Corporation (Todd/Fremont 3.36, 3.74-3.77); Metropolitan Life Insurance (Todd/ Fremont 3.70-3.73); Flintkot Company (Todd/Fremont 3.56-3.57); Viacom (Todd/Fremont 3.94-3.102); and AP Green Industries (Todd/Fremont 3.89-3.93).

On January 23, 2001, Claimant*s attorneys forwarded her four separate checks in the respective amounts of $21,149.00, $240.00, $45.00, and $33.60, reflecting the net settlement proceeds received from Owens Corning, 3M, Worthington, and Sepco. (Todd/Fremont 3.23 – 3.27).

In the January 23, 2001 cover letter to claimant, her attorney advised her that the she would not need to sign a separate release for either Worthington or Sepco. Rather, claimant was told that "cashing the enclosed checks will release Worthington and Sepco from all liability in the decedent*s case." (Todd/Fremont 3.23).

On April 23, 2001, Claimant was sent a settlement check from her attorneys for $1,405.00 in relation to her settlement of her claims against Garlock (Todd/Fremont 3.28-29).

As of August 7,2001, Claimant*s attorneys had distributed to Claimant six separate settlement checks totaling $23,007.60. (Todd/Fremont 3.30).

At the formal hearing in this matter, claimant testified that she had received checks pursuant to the third-party settlements entered into with the defendants in the Mississippi asbestos litigation. She further testified that she had cashed these checks.

## Discussion

At the hearing, claimant's counsel argued that the decedent was earning about $610.00 per week when he retired, and he developed the disability lung impairment shortly thereafter. (TR 42). The carriers argued that the average weekly wage was $417.80 pursuant to Section 10(a)2(B) for a retired employee. (TR 40).

The employer notes that

> When the evidence is viewed most favorably to Claimant, it is apparent that the gross settlements amount to $63,470.00. (Todd/Fremont, Exhibit 3.22). Claimant*s attorneys* assertion that there may be additional settlements in the asbestos cause of action and that these monies should also be included is not supported by any authority. The issue is whether the aggregate gross amount of the cases already settled is less than the potential compensation award.
>
> In the present case, Claimant alleges entitlement to widow*s benefits from the date of death, July 14, 1999, and ongoing. Claimant alleged in her prehearing statement that Claimant*s average weekly wage should be $15.25 per hour, plus union benefits. This calculates the $610.00 per week on a full-time basis, excluding union benefits. The widow*s benefit payment would be $305.00 per week.

The employer has stated that

> If Claimant*s compensation rate is assumed to be $305.00 per week, the unpaid disability compensation to date amounts to $37,210.00. Under the controlling authority, the court also needs to look to the compensation that Claimant would be receive over her life time. Claimant was born on November 2, 1936 and is 65 years old. (LS-262 Claim for Death Benefits). Under the 2001 edition of the "Future Damages Calculator" issued by the Lawyers Judges Publishing Company, Claimant has a life expectancy of 19.3 years. The weekly compensation rate of $305.00 amounts to $15,860.00 per year. This sum multiplied by 19.3 yields a future death benefits compensation value of - $306,098.00. This sum, added to the compensation due to-date, places the value of the longshore claim at $343,308.00. When the evidence is viewed in a light most favorable to Claimant, the gross aggregate settlement value is $63,470.00. This sum is far less than the value of the death benefit compensation over Claimant*s lifetime ($343,308.00). Therefore, Claimant was required to obtain approval from the Employer/Carrier of all of the third-party settlements. Her failure to do so bars her claim under Section 33(g)(1).

The defendants stated that it should be noted that Claimant argues that two of the defendants (Owens-Corning and W.R. Grace) are in bankruptcy and that the receipt of funds from those entities should not be considered a third-party settlement. If we assume that Claimant*s allegation is true, then the gross funds received from those entities should not be included in the calculation of the gross settlement for purposes of comparing the gross settlement with the amount of compensation to be paid. Claimant*s gross settlement with Owens-Corning was $40,000.00 (Todd/Fremont, Exhibit 3.22, 3.42). The gross settlement with W.R. Grace was $6,500.00 (Todd/Fremont, Exhibit 3.41). If these settlement amounts are taken away from the aggregate gross settlements, Claimant has settled her third-party claims for the sum of $16,970.00. This, again, is far less than the value of Claimant*s compensation over her lifetime under the longshore claim and her claim is barred under Section 3 3(g).

The undersigned notes that the leading case in this area is Estate of Cowart v. Nicklos Drilling Co. (supra). Mrs. Dilts is clearly a person entitled to compensation as she filed the third party claims after the death of her husband. The court held that

> We also reject Cowart*s argument that our interpretation of § 33(g) leaves the notification requirements of § 33(g)(2) without meaning. An employee is required to provide notification to his employer, but is not required to obtain written approval, in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer*s total liability. Under our construction the written approval requirement of § 33(g)(1) is inapplicable in those instances, but the notification requirement of § 33(g)(2) remains in force. That is why subsection (g)(2) mandates that an employer be notified of "any settlement."

Dilts argues that there was no "settlement" with several of the third party defendants as payments were made pursuant to court orders in bankruptcy proceedings. The defendants in this case concede that this may apply to several of the third party defendants.

However, the employer/carriers' exhibits and the testimony of the claimant clearly show that Mrs. Dilt's cashed checks from settlements with third party defendants who were not in bankruptcy.

The claimant has submitted July 2001 letters from Garlock, Dresser, Worthington, and 3M Company indicating that matters with Mrs. Dilts were settled pending the employer's approval. However, prior to mid-2001, the claimant signed releases with 3M Company and others. Those forms make no mention of a release conditioned on the signature of Todd Shipyards. Thus, the claimant made settlements without the knowledge and permission of Todd.

The claimant also argues that suits are pending against other third party defendants and that the total recovery will be for more than the amount of the federal compensation.

In Linton v. Container Stevedoring Company, 28 BRBS 282 (1994), the Board stated that

> We therefore hold that, in comparing the amount of compensation to which the claimant would be entitled under the Act to the amount of the third-party recovery in a case involving a continuing award, the claimant*s total lifetime entitlement to compensation must be considered. In arriving at an amount determinative of claimant*s lifetime entitlement, the administrative law judge, as finder-of-fact, may use any reasonable method to calculate the amount of compensation to which the claimant would be entitled over his lifetime. The determination of this lifetime amount will necessarily entail findings regarding claimant*s extent of impairment, the applicable compensation rate, and claimant*s life expectancy.

The defendants in this case have projected that the claimant could receive more than $300,00.00 under the Act according to actuarial tables. The claimant has not disputed this figure.

The claimant has argued that

> it should also be noted that the third party case is still open and that several defendants have not yet settled. The Claimant*s ultimate settlement amount may be even higher than the approximately $60,000 figure which the Employer submitted with their motion to dismiss.

The undersigned does realize that the burden is on the defendants in this case. However, the claimant has made settlements with solvent third party defendants and pocketed the net receipts, without notice to Todd.

Moreover, Todd has projected payments of over $300,000.0 under the Act and the claimant has merely indicated that payments from all third party defendants may exceed $60,000.00.

I find that Todd and the carriers have carried the burden of proof and that factual issues do not remain. There is a bar to compensation in this case pursuant to Section 33(g) of the

Act. There is no genuine issue of material fact. The employer/carrier's motion for summary decision is granted pursuant to the criteria in 29 C.F.R. §18.41.

A
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia